STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 4, 2002
v	No. 232010 Wayne Circuit Court
ALLAN S. RENWICK Defendant-Appellant.	LC No. 99-012664

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was originally charged with first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and first-degree child abuse, MCL 750.136b(2). The trial court sentenced defendant to natural life imprisonment for the first-degree murder conviction and to a concurrent term of three to ten years' imprisonment for the assault with intent to do great bodily harm conviction. We affirm, but remand for correction of the judgment of sentence and presentence investigation report.

On October 9, 1999, defendant killed his ex-wife with a machete and seriously injured his daughter by cutting her wrist with a razor blade at their apartment in Harper Woods. Defendant claims he cannot remember killing his ex-wife or cutting his daughter's wrist. Defendant presented a defense of diminished capacity based on his consumption of alcohol shortly before the attack.

Defendant contends that he was denied his due process and equal protection rights to a fair trial by the prosecutor's misconduct during the trial. Specifically, defendant argues that the prosecutor's line of questioning was ethnically biased and that the evidence was irrelevant. Initially, defendant claims that the following exchange during the prosecution's cross-examination of defendant was an improper comment on, and injection of, defendant's race, ethnicity, and religion in the proceedings:

> *Ms. Nessel*: All right. So, Mr. Renwick, you were saying that you were upset by finding your wife on Belle Isle with another man, correct?
>
> *Defendant*: Yes, ma'am.

Ms. Nessel: Okay. And, in fact, the morning that you killed her, you were upset at that time, as well, were you not?

Defendant: Yes, ma'am.

Ms. Nessel: And then you were actually upset all day long about it.

Defendant: Yes, ma'am.

Ms. Nessel: Okay. And let me ask you, Mr. Renwick. You're from Trinidad, correct?

Defendant: Yes, ma'am.

Ms. Nessel: Now, in Trinidad, isn't it true that women don't really have too many rights in Trinidad?

Ms. Robinson: Objection, relevancy.

Ms. Nessel: It goes to state of mind, your Honor.

Ms. Robinson: What does he know about the state of women's rights in Trinidad, and when?

The Court: You can ask him what he thinks in that regard.

Ms. Nessel: I absolutely will.

Ms. Robinson: I'd object to that, Judge. I mean that has nothing to do with this. It's not relevant to his state of mind, in terms of the adulterous or the betrayal by his mate, to what happens to women in Trinidad.

Ms. Nessel: It goes to motivation. It goes to motivation.

The Court: Well, he can tell what his state of mind is in that regard, but not what other people in Trinidad think.

Ms. Nessel: I understand.

Ms. Nessel: Well, isn't it a custom in Trinidad – it's not uncommon for people whose wives have been unfaithful to them for them to use a machete on them, is it?

Ms. Robinson: Objection, your Honor, there is no relevance.

Ms. Nessel: Please. If you give me a little bit of leeway, I promise you'll see where this is going with state of mind. I cannot ask it all in one question. If the Court believes I've gone out of bounds, then please strike everything. Just give me a few more questions.

The Court: All right. For now, I'll take that objection under advisement.

Ms. Nessel: That's true, isn't it?

Defendant: I don't understand the question.

Ms. Nessel: That it's not an uncommon practice, in Trinidad, that if a man's wife has been unfaithful to him, that he uses a machete on her to teach her a lesson.

Ms. Robinson: Your Honor, can we have a foundation for the custom? What information is – what foundation? I mean I want you to have some foundation, here, in terms of this custom: time, place, groups, ethnic groups. In Trinidad there are several ethnic groups that have various customs.

Ms. Nessel: Your Honor, I'm asking him if he's aware of this? Why do I have to lay a foundation for the –

The Court: (Interposing) For that question, you don't need a foundation. I'll allow it.

Ms. Nessel: Are you aware of that, sir?

Defendant: Some of – the Indians, yeah. The Indians do it.

Ms. Nessel: Okay. So, you are aware that where you're from that's not an uncommon practice, correct?

Defendant: Not uncommon.

Ms. Nessel: It happens there, correct?

Defendant: It happens, yeah. Indians.

Ms. Nessel: And you, sir, also believe that if a person's wife has been unfaithful to them, that that's an appropriate way to teach them a lesson, using a machete on them?

Ms. Robinson: Objection, your Honor. That's totally inappropriate, what he believes. This is totally inappropriate.

Ms. Nessel: How is it inappropriate, what he believes and what his state of mind is?

Ms. Robinson: It's not relevant as to what he believes, his whole belief system.

Ms. Nessel: Your Honor, if he believes that it's okay to use a machete on a woman when she's been unfaithful, how is that not relevant to these proceedings, if that's in fact what he's done?

The Court: I think it's relevant. Overruled.

Ms. Nessel: Isn't that how you teach a woman a lesson who's been unfaithful to you? You hack her up with a machete, right?

Defendant: The Indians do that to them.

Ms. Nessel: Right. And that's what you decided to do in this case when you learned that your wife was being unfaithful, correct?

Defendant: No ma'am.

Ms. Nessel: Well, when did you first decide to teach your wife a lesson for being with another man? When did that first enter your thought pattern?

Ms. Robinson: Objection. Facts not in evidence. He never said he was going to teach her a lesson.

Ms. Nessel: Your Honor, please. This is cross-examination. And I think at this point, the defense counsel is simply objecting so that she can interrupt me and for no other reason.

The Court: Overruled.

Ms. Nessel: When did you first decide you would teach your wife a lesson by using a machete on her?

Defendant: I can't remember the exact time.

Ms. Nessel: Okay. But at some point, you decided that it would be a good idea, correct?

Defendant: Yeah, at some time I was gonna teach her a lesson. But I can't remember the exact time I would teach her.

From the context of the questioning, it is obvious that the prosecutor was not inquiring into defendant's religious background or cultural heritage. The prosecutor asked defendant if he was aware of a custom in Trinidad that some men will hack their unfaithful wives with a machete to teach them a lesson. Defendant replied, "The Indians do it." As defendant notes in his brief, there was no evidence introduced that defendant belonged to the Indian subpopulation of Trinidad. In fact, defendant's answer, "The Indians do it," implies that whatever cultural heritage he belongs to does not regularly engage in the same ritualistic behavior. Further, defendant's daughter testified that defendant looked specifically for the machete before using it on his ex-wife. On cross-examination, *defense counsel* questioned defendant's daughter to emphasize that the machete had come from Trinidad and that it had special meaning for him. It was defendant who originally made the link between the machete and Trinidad. There was no improper ethnic bias in the prosecutor's line of questioning.

Defendant next argues that the prosecutor impermissibly used this evidence as propensity evidence to prove that defendant premeditated the murder. Defendant claims that the Michigan Rules of Evidence preclude the admission of this evidence. However, MRE 401 through MRE 403[1] provide for the admission of any evidence having a tendency to make the existence of any fact of consequence to the case more or less probable, as long as the evidence's probative value is not substantially outweighed by its prejudicial effect. MRE 404[2] requires that the evidence have some probative value other than to defendant's character. See *People v Sabin (After Remand)*, 463 Mich 43; 614 NW2d 888 (2000).

Here, the prosecutor's line of questioning focused on defendant's knowledge that some men cut their unfaithful wives with machetes and his thought process in arriving at the decision

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[1] MRE 401 states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

MRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[2] MRE 404 states, in part:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
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> * * *
>
> (b) Other crimes, wrongs, or acts.
>
> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

to do the same to his unfaithful ex-wife. Defendant admitted, both on cross-examination and in his statement to police, that he decided to teach his ex-wife a lesson by cutting her. Why defendant decided to murder his ex-wife in a ritualistic manner is certainly relevant to a matter of consequence in the case. Defendant's state of mind, motive, and *intent* in killing her in that manner are non-character related reasons for the admissibility of this evidence.

Defendant also challenges the prosecutor's introduction of evidence that defendant went out with prostitutes. While defendant's other liaisons with prostitutes may not have been relevant, the testimony that he was at Belle Isle in the company of a prostitute when he spotted his ex-wife with her boyfriend was relevant as background information about the events leading to the murder. See *People v Aldrich*, 246 Mich App 101, 115; 631 NW2d 67 (2001). The evidence of liaisons with prostitutes at other times had no relevance to the case, and was therefore inadmissible; however, the references were fleeting and the trial court is presumed to know the law and be able to ignore evidentiary errors and decide a case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

Defendant further contends that the prosecutor's closing argument, in which she referred to defendant "need[ing] to get a machete which is the traditional object we know that men use to kill their disloyal wives in his native home in Trinidad," denied him a fair trial. This comment was the only reference to this "custom" in the prosecutor's closing and rebuttal arguments. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, defendant had testified that "the Indians" used a machete to kill unfaithful wives in Trinidad. Therefore, the prosecutor's reference was to evidence presented at trial.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). "We require a fair trial, not a perfect trial." *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). Here, the trial court sat as the factfinder. As stated *supra*, the trial court is presumed to know the law and be able to ignore evidentiary errors and decide a case based solely on properly admitted evidence. *Taylor*, *supra* at 305. Defendant has not demonstrated that the alleged prosecutorial misconduct denied him a fair trial.

Defendant next contends that his conviction for assault with intent to commit great bodily harm (AWIGBH) must be vacated because the trial court rendered inconsistent verdicts. The court convicted defendant of the AWIGBH charge, but acquitted him of the first-degree child abuse charge. Defendant argues that the court could not logically find that defendant did not knowingly cause serious physical harm by cutting his daughter's wrist, yet that he assaulted her with intent to do great bodily harm for the same act.

Defendant relies on *People v Burgess*, 419 Mich 305, 310; 353 NW2d 444 (1984), for his position that a trial judge in a bench trial cannot render a verdict that is inconsistent or the product of compromise. This position is misplaced. For verdicts to be inconsistent, the factual findings underlying the verdicts must be inconsistent. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998).

The elements of assault with intent to do great bodily harm less than murder are (1) an assault coupled with (2) a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996). The elements of first-degree child abuse require the prosecution to prove that (1) a person who had responsibility for or care of a child (2) knowingly or intentionally (3) caused serious physical or mental harm to the child. *People v Gould*, 225 Mich App 79, 87; 570 NW2d 140 (1997). Defendant contends that the proofs for each of these are sufficiently similar such that his conviction for AWIGBH is inconsistent with his acquittal for first-degree child abuse.

The court made no specific findings on the child abuse charge, other than acquitting defendant. It is unclear why the trial court dismissed the first-degree child abuse charge; however, the prosecutor concedes that the trial court gave defendant a "waiver break" in convicting him only of the AWIGBH charge even though the evidence also supported the first-degree child abuse charge. In any event, defendant's conviction for AWIGBH was clearly supported by the evidence and the court's findings of fact. The court clearly and specifically found that defendant intended to cause great bodily harm to his daughter when he slashed her wrist with a razor blade and that the ensuing injury "seriously and permanently harmed the function of that part of her body." Under these circumstances, we will not reverse defendant's conviction of an offense of which he was clearly found guilty beyond a reasonable doubt. *Smith*, *supra* at 53.

Defendant next claims that his judgment of sentence and presentence investigation report (PSIR) must be corrected to accurately reflect the number of days credit for time he spent in jail between being arrested and sentenced and to delete contested comments from the PSIR. The prosecutor does not contest defendant's claim.

If the court finds that challenged information in a PSIR is inaccurate or irrelevant, that finding must be made part of the record and the information must be corrected or stricken from the report. MCL 771.14(6); MCR 6.425(D)(3)(a); *People v Hoyt*, 185 Mich App 531, 534; 462 NW2d 793 (1990). When a sentencing court disregards information challenged as inaccurate, the court effectively determines that the information is irrelevant and the defendant is entitled to have the information stricken from the report. *Hoyt*, *supra* at 534.

Here, the court disregarded the comments the investigator made about defendant's lack of remorse and concern for his children when sentencing defendant, so the information should be stricken from the report. Because the court did not rely on the challenged information in sentencing defendant, resentencing is not required. See *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001). Also, the PSIR indicates that defendant was incarcerated for 386 days between his arrest and sentencing, for which he should receive credit. The prosecution acknowledges the trial court must correct this error. Therefore, the case is remanded to the trial court for administrative corrections to defendant's PSIR and judgment of sentence.

Finally, defendant argues that he was denied the effective assistance of trial counsel by defense counsel's failure to call as a witness the friend to whom defendant was talking to regarding moving to New York on the day of the murder. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable

probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant asserts that the friend's testimony regarding defendant's plan to move to New York and stay with him would explain defendant's comments to his son on the day of the murder, i.e., "whatever I do, try to forgive me," in the context of defendant moving and not as premeditation of the murder. Defendant contends that, because the court specifically relied on his comments to his son as an indication of his premeditation of the murder, defense counsel's performance fell below an objective standard of reasonableness under prevailing professional norms by failing to call the friend to explain the comments in the different context. In support of this argument, defendant attaches his personal affidavit to his Standard 11 brief, averring that the friend would have testified that defendant was planning to move to New York. However, defendant does not indicate how this information would have changed the outcome of his trial. Defendant himself had already testified that he was planning to move to New York and that his comment to his son should be construed in the context of asking his son to forgive him for moving away. Therefore, the friend's testimony would only have been cumulative. Furthermore, defendant's telephone call to the friend could itself have been construed as premeditation of a plan to flee and disappear after the murder.

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Rice (On Remand)*, *supra* at 445. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Hoyt*, *supra* at 537-538.

Here, defendant has not shown that defense counsel's failure to call his friend as a witness was not trial strategy. Defendant has also failed to show that the friend's testimony would have changed the outcome of the trial or that it deprived defendant of a substantial defense. The court based its findings that defendant premeditated his ex-wife's murder on other factors *as well as* defendant's comment to his son. These factors included defendant's statements that he had wanted to teach his ex-wife a lesson and that he had been thinking about it for a few days, his search for the machete, his sneaking up on his ex-wife to begin the attack, the brutality of the attack itself, and defendant's attempt to leave the scene and elude the police. Even taking defendant's comments to his son in the context defendant suggests, there is ample evidence to indicate that defendant premeditated the murder.

Affirmed, but remanded to the trial court for the limited purpose of correcting defendant's judgment of sentence regarding the appropriate credit for jail time served, and to correct the presentence investigation report. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Hilda R. Gage